ORIGINAL

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden, San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JOSEPH SHEMARIA
Attorney at Law
8434 Wilshire Blvd., Suite 650
Beverly Hills, California 90211
(213) 658-7066

Attorney for Respondent

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	1
JURISDICTION	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
ARGUMENT	
I UNDER THE FACTS OF THIS CASE A CALIFORNIA PRISONER HAS EXHAUSTED HIS STATE REMEDIES PRIOR TO INSTITUTING FEDERAL HABEAS CORPUS PROCEEDINGS.	6
II TITLE 28 U.S.C. SECTION 2254(D) CLEARLY AUTHORIZES A DISTRICT COURT TO MAKE FINDINGS CONTRARY TO A STATE COURT IN HABEAS CORPUS PROCEEDINGS.	12
III THE SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO SELF REPRESENTATION APPLIES RETROACTIVELY TO STATE CRIMINAL TRIALS OCCURRING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, 422 U.S. 806 (1975).	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	Page
Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969)	16
Bayless v. United States, 381 F.2d 67 (9th Cir. 1976)	16
Bittaker v. Enomoto, 587 F.2d 400 (9th Cir. 1978)	15
Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)	15
Engle v. Isaac, ___U.S.___, 71 L.Ed. 2d 783 (1982)	6,11
Faretta v. California, 422 U.S. 806 (1975)	7,15
In re Waltreus, 62 Cal. 2d 218 (1965)	8,10
Martin v. Wyrick, 658 F.2d 583(8th Cir. 1978)	15
Maxwell v. Sumner, 673 F.2d 1031 (9th Cir. 1982)	15
Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535 (1968)	9
People v. Holcolm, 395 Mich. 326 (1975)	16
People v. McDaniel, 16 Cal.3d 156 (1976)	7,6
People v. Sharp, 7 Cal. 3d 448 (1972)	16,17
Rose v. Lundy, ___U.S.___, 71 L.Ed. 2d 379 (1982)	6,11
Sumner v. Mata, 449 U.S. 539 (1981)	13,14
United States v. Frady, ___U.S.___, 71 L.Ed.2d 618 (1982)	6,12
Walker v. Loggins, 608 F.2d 731 (9th Cir. 1979)	15
Statutes	
28 U.S.C. §2254	13
Miscellaneous	
California Rules of Court, Rule 28(d)(2)	10
B.W. Witkin, California Procedure, Appeal	9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden, San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether under the facts of this case a California prisoner exhausted his state remedies prior to instituting federal habeas corpus proceedings?

2. Whether the federal court may make findings contrary to the state trial court where the findings are based only on a review of the state trial court transcripts?

3. Does the Sixth Amendment Constitutional right of self representation apply retroactively to state criminal trials occurring prior to this Court's decision in Faretta v. California, 422 U.S. 806 (1975)?

//

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1)

STATEMENT OF THE CASE

ANTHONY PAUL MAXWELL, petitioned the United States District Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Maxwell alleged that his constitutional right of self-representation was violated at his state criminal trial.

The District Court granted Maxwell the relief he sought and issued an order conditionally granting the petition for writ of habeas corpus. The Appellant, G.W. Sumner, Warden of San Quentin Prison, has obtained a stay pending appeal and appealed the order to the Ninth Circuit. The Ninth Circuit affirmed the judgment in Maxwell v. Sumner, 673 F. 2d 1031 (9th Cir. 1982).

STATEMENT OF THE FACTS

Prior to submitting the case for decision in the District Court, the parties entered into the following stipulation concerning the facts in this case.

On March 11, 1975, an information was filed in the Los Angeles Superior Court charging Anthony Paul Maxwell with two counts of robbery (Penal Code §211) and two counts of assault with a deadly weapon (Penal Code §245(b)). The information further alleged that at the time of the commission of the offenses, Maxwell used a firearm within the meaning of Penal Code, §12022.5.

On June 19, 1975, the trial in Maxwell's case commenced. On June 30, 1975, the jury found Maxwell guilty of all four criminal charges. Also, on June 30, 1975, the United States Supreme Court's decision in Faretta v. California, 422 U.S.

806 (1975) was filed with the Clerk of the United States Supreme Court.

In the reporter's transcript of Maxwell's trial, at pp. 48-57, the record indicates that Maxwell made a motion to relieve the deputy public defender assigned to represent him in his case. That motion was denied. Thereafter, Maxwell moved for permission to represent himself in pro se. That motion was likewise denied. This motion was apparently made on June 19, 1975. The record of Petitioner's request reads as follows:

> MAXWELL: Your Honor, Mrs. Cunningham told me that she didn't like my personality. She told me that she guaranteed me a conviction in this court and at this time I would like to enter a motion propria persona.
>
> THE COURT: That motion is denied.
>
> MAXWELL: I'd like to enter it anyway for the record.
>
> THE COURT: All right, you may.
>
> MAXWELL: I'd like to reflect that I am submitting that since the right to proceed pro se is bottomed on the Constitution, the defendant need not show actual prejudice in order to secure a reversal of a conviction. United States v. Pike, Ninth Circuit, 497 F. 2d 695, United States v. Price, 474 F. 2d 1223 (1973); and Bayless v. United States, supra, at 384 F. 2d 67.
>
> At this time I'd like to give the D.A. a copy of this and also a copy for the clerk to be incorporated into the clerk's transcript.
>
> THE COURT: The clerk will put it in the record. Hand it to the bailiff. I'm sure the district attorney doesn't want a copy.

//

Do you have any other motions?

The above colloquy between the Maxwell and the Court occurred on June 19, 1975. After his conviction, Maxwell filed a notice of appeal. On November 3, 1975, Maxwell's court-appointed counsel, Dennis L. Cava, filed an opening brief in the Court of Appeal of the State of California, Second Appellate District, arguing that Maxwell had been denied his constitutional right of self-representation under Faretta v. California, 422 U.S. 806 (1975). On September 16, 1976, in an unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, Maxwell's judgment of conviction was affirmed. The Court of Appeal rejected Maxwell's argument that his rights under Faretta had been violated. The opinion of the Court of Appeal reads as follows:

> Citing Faretta v. California, 422 U.S. 806, defendant additionally contends that he was denied his constitutional right of self representation. The Faretta rule, however, is to be applied only to those cases commencing after June 30, 1975[2/] [Footnote 2: Defendant's trial commenced on June 19, 1975] the date upon which the decision in Faretta was filed. (People v. McDaniel, 16 Cal. 3d 156, 168). It is therefore inapplicable and the rule of People v. Sharp, 7 Cal. 3d 448, 459-461, must be applied in the present case.
>
> * * *
>
> Under these circumstances, we cannot say that there was an abuse of discretion in refusing defendant's belated request to act as his own counsel.

The record in the instant case filed with the District Court indicates that thereafter Maxwell filed a Petition for

//

Hearing in the California Supreme Court. The Petition was filed by his court-appointed lawyer, Dennis L. Cava. In that Petition, the Faretta argument was not raised, nor presented to the California Supreme Court. As required by Rule 28(d)(2) of the California Rules of Court, the Petition for Hearing in the California Supreme Court contained "a copy of the Opinion of the Court of Appeal." The Petition for Hearing in the California Supreme Court was denied. Thereafter, Maxwell filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California raising the Faretta issue.

The key dates in this case are briefly summarized as follows for the convenience of the Court:

June 19, 1975	Maxwell's motion to represent himself in pro se is denied.
June 30, 1975	Maxwell is convicted in Los Angeles Superior Court.
June 30, 1975	Faretta v. California, 422 U.S. 806 (1975) is decided.
July 30, 1975	Maxwell files a notice of appeal.
November 3, 1975	Maxwell raises his Faretta claim in the Court of Appeal of the State of California in his opening brief.
February 11, 1976	People v. McDaniel, 16 Cal. 3d 156 (1976) is decided by the California Supreme Court ruling that Faretta applies prospectively only to trials starting on or after June 30, 1975.
September 16, 1976	Maxwell's conviction is affirmed by the Court of Appeal and his Faretta claim is rejected pursuant to People

//

v. McDaniel, supra.

October 25, 1976 — Maxwell files a Petition for Hearing in the California Supreme Court and the Faretta claim is not raised.

October 6, 1977 — Maxwell's Petition for Writ of Habeas Corpus, filed directly in the California Supreme Court raising the Faretta claim, is denied.

February 21, 1978 — Maxwell files a Petition for Writ of Habeas Corpus in the United States District Court raising the Faretta claim.

ARGUMENT

I

UNDER THE FACTS OF THIS CASE A CALIFORNIA PRISONER HAS EXHAUSTED HIS STATE REMEDIES PRIOR TO INSTITUTING FEDERAL HABEAS CORPUS PROCEEDINGS.

The State's petition for writ of certiorari is now before this Court seeking to reverse the judgment granting a conditional writ of habeas corpus by a United States District Court. The State of California is arguing that this Court should apply recent decisions that have cut back on the habeas corpus remedy and reverse the Ninth Circuit Court of Appeals decision which affirmed the granting of the writ. These recent decisions are Rose v. Lundy _____ U.S. _____, 71 L. Ed. 2d 379 (1982); Engle v. Isaac, _____ U.S. _____, 71 L. Ed 2d 783 (1982); and United States v. Frady, _____ U.S. _____, 71 L. Ed. 2d 816 (1982). Unfortunately for the State of

//

//

California, none of these decisions apply to the unique facts of this case.

Both parties to this appeal agree that the facts of this case are not disputed as they relate to the waiver issue. Anthony Maxwell was charged in state court with the commission of two robberies and two assaults with a deadly weapon. Just prior to trial, he sought permission of the court to proceed in pro se. That motion was denied and his public defender remained as counsel over the objection of Mr. Maxwell. On June 30, 1975, a jury found Mr. Maxwell guilty of all four criminal charges. On the very same day, June 30, 1975, the United States Supreme Court decided Faretta v. California, 422 U.S. 806 (1975). Mr. Maxwell appealed his convictions to the Court of Appeal of the State of California. An attorney was appointed to represent him on that appeal. In the opening brief, it was argued that Mr. Maxwell was denied his constitutional right of self-representation under the Faretta decision. The Court of Appeal affirmed his conviction, citing the California Supreme Court decision of People v. McDaniel, 16 Cal. 3d 156 (1976).

In People v. McDaniel, 16 Cal. 3d 156 (1976), the California Supreme Court held that the Faretta decision applied only prospectively to trials starting on or after the date of the Faretta decision. Since Mr. Maxwell's trial started prior to the date of the Faretta decision, the Court refused to apply the holding in Faretta retroactively to the case of Mr. Maxwell.

Thereafter, a court-appointed attorney for Mr. Maxwell filed a petition for hearing in the California Supreme Court. In the legal brief attached to the petition, the attorney for Mr. Maxwell did not raise the self-representation issue. However, attached as an exhibit to the petition for hearing was a copy of the decision of the Court of Appeal in which the

self-representation issue was raised and rejected. The petition for hearing before the California Supreme Court was denied. Approximately one year after the California Supreme Court denied a hearing, Mr. Maxwell filed a petition for writ of habeas corpus directly in the California Supreme Court raising his self-representation issue. That petition was denied by the Court, citing In re Waltreus, 62 Cal. 2d 218, 225 (1965). The Waltreus case merely stands for the proposition that a "habeas corpus ordinarily cannot serve as a second appeal." (Id., at 225)

Maxwell contends that he has adequately raised the self-representation issue in the state court proceedings. He raised the issue in the trial court by making a motion for self-representation and he raised the issue before the California Court of Appeal by arguing that his rights under Faretta has been violated. Although the issue was not actually argued in the petition for hearing before the California Supreme Court, it was still the position of Mr. Maxwell that the legal issue was presented to the California Supreme Court when the petition for hearing was filed in his case. A petition for hearing in the California Supreme Court is an attempt to obtain discretionary review of the decision of the California Court of Appeal. It is similar to an attempt by a federal litigant to have the United States Supreme Court grant a discretionary writ of certiorari from an opinion of a lower federal Court of Appeals.

However, the California state court practice has one very important difference between it and the federal system. If the California Supreme Court grants a hearing in any particular case, the opinion of the Court of Appeal is vacated and thereafter the California Supreme Court will decide all the

//

legal arguments raised in the brief filed in the Court of Appeal. B.W. Witkin, California Procedure, Appeal, §617 p.4540 (1971). In California Procedure, the author states on p. 4540:

> An order granting a hearing must be signed by at least four justices and filed. (Rule 28(e)) On granting "the cause shall be placed on the calendar for oral argument, unless oral argument is waived." (Rule 28(f); see 17 So. Cal. L. Rev. 243) The case is then "at large," i.e., to be decided on the entire record and all the issues as if originally appealed to the Supreme Court, regardless of the ground relied upon in granting the hearing. And the opinion of the Court of Appeal ceases to have any effect, except perhaps to serve as a brief on the questions discussed, or a draft of an opinion to be adopted. (emphasis added)

An example of how this procedure works is seen from the decision of the California Supreme Court in Menchaca v. Helms Bakeries, Inc., 68 Cal. 2d 535, 541 n.1 (1968). In that case, the Supreme Court cited an issue raised in the Court of Appeal despite the fact that it was not briefed in the petition for hearing. In the Helms case, the Court states:

> Although plaintiffs did not raise the issue of negligent equipage in their petition for hearing, the question was briefed by both the parties and may be reviewed by this Court. An order granting a petition for hearing transfers the entire case here [citation] and the case is then to be decided on all issues, as if originally appealed to this Court, regardless of the grounds relied on in the petition. [citation]

Since Mr. Maxwell's petition for hearing contained a copy

//

of the opinion of the Court of Appeal, the Faretta issue was, technically speaking, raised in the petition for hearing. It is not disputed that every petition for hearing filed in the California Supreme Court must contain a copy of the entire decision rendered by the Court of Appeal. Rule 28(d)(2) of the California Rules of Court states that in a petition for hearing before the California Supreme Court, "each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing." Obviously, in reviewing a petition for hearing, the Justices of the California Supreme Court do not confine themselves to the four corners of the petition itself. They must, of necessity, read the entire opinion of the Court of Appeal. In the present case, when that occurred, the self-representation issue was presented to all seven Justices of the California Supreme Court. It was at that point that Maxwell had exhausted all of his state court remedies.

And if that were not enough, Maxwell also filed a petition for writ of habeas corpus directly in the California Supreme Court raising the self-representation issue. That petition was denied, with the California Supreme Court citing the Waltreus decision. However, the Waltreus decision does not indicate that the self-representation issue was deemed to be procedurally barred by the California Supreme Court. Rather, a citation to the Waltreus decision indicates that the self-representation issue had previously been presented to the California Supreme Court and was rejected.

In the case of In re Waltreus, 62 Cal. 2d 218 (1965), a criminal defendant, who had already appealed his conviction and had his convictions affirmed on appeal, attempted to raise all of the same issues in a subsequent petition for writ of

//

habeas corpus in state court. The petition for writ of habeas corpus was denied on the grounds that "These arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." In re Waltreus, supra, at 225. Thus, in denying Mr. Maxwell's petition for writ of habeas corpus, the California Supreme Court, by citing to the Waltreus decision, was in effect stating to Maxwell that it had already passed upon the self-representation issue in the earlier petition for hearing filed after his unsuccessful appeal in the Court of Appeal of the State of California. Therefore, there has been no waiver of the self-representation issue and that it has been raised at all levels of the state criminal proceedings: the trial level, the Court of Appeal, and the California Supreme Court.

None of the recent cases limiting habeas corpus even remotely applies to Mr. Maxwell's case. Rose v. Lundy _____ U.S. _____, 71 L. Ed. 2d 783 (1982) held that a petition for writ of habeas corpus must be dismissed when it contains both exhausted and unexhausted claims. Engle v. Isaac, _____ U.S. _____, 71 L. Ed. 2d 783 (1982) held that habeas corpus relief is barred where a prisoner failed to make a contemporaneous objection at trial to the giving of a jury instruction which later case law held to be violative of due process. Under Engle, a prisoner has not shown good "cause" for failing to raise the issue in the state courts merely because existing state court decisions had rejected the constitutional claim in the past.

Finally, in United States v. Frady, _____ U.S. _____, 71 L. Ed. 2d 816 (1982) this Court held that "cause and actual prejudice" rather than "plain error" is the proper standard of

//

//

review on a motion for collateral relief under 28 U.S.C. §2255. The prejudice element of the cause and prejudice test required a showing that the constitutional violation prejudiced the defendant by interfering with his right to a fair trial.

In Mr. Maxwell's case, the cause and prejudice test was never reached as there was no bypass of the state courts and Mr. Maxwell did exhaust his state remedies prior to seeking habeas corpus relief.

II

TITLE 28 U.S.C. SECTION 2254(D) CLEARLY AUTHORIZES A DISTRICT COURT TO MAKE FINDINGS CONTRARY TO A STATE COURT IN HABEAS CORPUS PROCEEDINGS.

The State of California posed the second question in this case as follows: "May a federal court, consistent with principles of comity, disregard a state court's factual determinations, reweigh the evidence presented to the state court and make contrary findings, where the federal court's findings are based solely on a review of state court transcripts?" That question has already been answered by this Court in Sumner v. Mata, 449 U.S. 539 (1981).

In Sumner this Court held that the District Court in habeas corpus proceedings has the authority under 28 U.S.C. §2254(d) to reweigh the evidence relied upon by a state court in determining a factual issue and to conclude that the factual determination is not fairly supported by the record. All that is required to implement this power is for the District Court to apply on the face of the opinion the initial presumption of correctness mandated by 28 U.S.C. §2254(d) to

//

the state factual determination. So the question posed by the State of California has already been answered in the affirmative by this Court in Sumner v. Mata, supra.

The added factor raised by the State in their phrasing of the issue is whether the District Court's mere reading of the state trial transcripts constitutes an adequate hearing at which the Court's power, under 28 U.S.C. §2254(d) may be exercised. However, this issue has never before been raised by the State of California in any of the prior proceedings in this case. In the Court of Appeals, the State argued that after reading the state trial transcripts, the District Court simply reached the wrong conclusions.

Ironically, it was the State which provided the transcripts of Mr. Maxwell's state criminal trial as an exhibit in support of Mr. Maxwell's confinement in prison. No objections were ever made by either party in the District Court to the Court's reading of the record of the criminal trial. How else could the District Court familiarize himself with the alleged constitutional violation? The transcripts of the criminal trial were a verbatim record of what had occurred and probably formed the best evidence upon which the District Court could rely. Thus the petition for certiorari should be denied.

In a collateral issue the State argues that the Ninth Circuit erroneously stated the standard of review in habeas corpus appeals. In this case, the Appellate Court stated that the decision of the District Court would not be reversed unless the findings of the District Court were clearly erroneous. Maxwell v. Sumner, 673 F. 2d 1031, 1036 (9th Cir. 1982). This is the appropriate standard of review under Rule 52(a) of the Federal Rules of Civil Procedure, which provides in part that "Findings of fact shall not be set aside unless clearly

//

erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness".

The State argues that since the record consisted of merely the transcripts of Mr. Maxwell's state trial, that there were no witnesses whose credibility had to be resolved by the District Court. Therefore, the argument proceeds, the Court of Appeal should review the record of the state trial and make its own independent determination of whether Mr. Maxwell engaged in improper conduct which would permit the state trial judge to deny his self-representation motion.

Such an argument would be inconsistent with a correct understanding of the functions of a trial court as opposed to the functions of an appellate court. The trial court must make the initial factual determination subject to review on appeal for error of law by the appellate court. The State's argument would turn the Ninth Circuit Court of Appeals into a second trial court giving the state a second opportunity to have a federal court weigh the evidence and make factual findings and determinations. Such an argument should not be accepted.

III

THE SIXTH AMENDMENT CONSTITUTIONAL RIGHT OF SELF REPRESENTATION APPLIES RETROACTIVELY TO STATE CRIMINAL TRIALS OCCURRING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, 422 U.S. 806(1975).

The Respondent, Anthony Paul Maxwell, must candidly concede that there is a split of authority in the federal circuits on the issue of the retroactivity of Faretta v. California, 422 U.S. 806 (1975). This Court's Faretta

//

decision held that a criminal defendant is entitled under the Sixth Amendment to the right of self representation in his criminal trial. In Faretta this Court stated:

> To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the life-blood of the law." (422 U.S., at 834)

On the one hand, the Eighth Circuit has held that the Faretta decision is not retroactive to cases tried before the date of that decision. Martin v. Wyrick, 568 F. 2d 583 (8th Cir. 1978). On the other side is the Fifth Circuit and the Ninth Circuit which give the Faretta decision complete retroactivity. Chapman v. United States, 553 F. 2d 886 (5th Cir. 1977); Bittaker v. Enomoto, 587 F. 2d 400 (9th Cir. 1978); Walker v. Loggins, 608 F. 2d 731 (9th Cir. 1979); Maxwell v. Sumner, 673 F. 2d 1031 (9th Cir. 1982)

The state courts appear to likewise be in disagreement over the retroactivity issue. See, People v. McDaniel, 16 Cal. 3d 156 (1976) cert. denied 429 U.S. 847 (1976) (holding

//

Faretta not retroactive) and People v. Holcomb, 395 Mich. 326 (1975) (holding Faretta is retroactive). The problem is particularly acute in California where the California Supreme Court is against retroactive application of Faretta and where also the United States Court of Appeals for the Ninth Circuit is consistently releasing state prisoners whose self representation motions were made and denied prior to this Court's Faretta decision. Before Faretta, California refused to recognize any constitutional right to self representation. People v. Sharp, 7 Cal. 3d 448 (1972).

Nevertheless, the Respondent urges this Court to deny the petition for writ of certiorari because the approach of the Ninth Circuit in this case is patently correct. In arguing that the Faretta case should not be applied retroactively, the State of California assumes that the Faretta case established a new principle of constitutional law. Although it is true that the rule was new as it applied to state court criminal proceedings in the State of California, it was not a new principle in criminal proceedings in the federal courts of the Ninth Circuit. See, Arnold v. United States, 414 F. 2d 1056, 1058 (9th Cir. 1969); Bayless v. United States, 381 F. 2d 67, 71 (9th Cir. 1976).

The principles governing whether or not a case should be applied retroactively are set forth in Stovall v. Denno, 388 U.S. 293 (1967). The three factors that the Court should consider are "(a) purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of the retroactive application of the new standard." Stovall v. Denno, supra at 296-297.

All of the three standards weigh in favor of making the

//

Faretta decision retroactive. The purpose of the new standard is no less than to honor the personal liberty and dignity of the individual. Although California may have placed great reliance upon their own decision in People v. Sharp, supra, that reliance could not have been very firm in light of all the Ninth Circuit decisions indicating that the accused has a constitutional right of self-representation. Finally, the effect on the administration of justice is not so great as to indicate that Faretta must be limited to prospective application. In Stovall v. Denno, supra, the Court was faced with the issue of whether or not the newly enunciated constitutional right to have an attorney present at a lineup should be applied retroactively. The Court found that "The law enforcement officials of the Federal Government and all of the 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until Wade was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 557.... It is, therefore, very clear that retro-application of Wade and Gilbert would seriously disrupt the administration of our criminal laws." Stovall v. Denno, 388 U.S. 293, 299-300 (1967) Thus, the Supreme Court held that the Wade and Gilbert rules should not be made retroactive.

On the other hand, there is no indication that the Federal Government and all of the 50 States have assumed that there was no constitutional right of self-representation. On the contrary, the Ninth Circuit has expressly recognized such a right on numerous occasions in the past. Furthermore, the issue of self-representation is an issue that arises only infrequently during the course of state criminal proceedings.

Thus, the danger of having Faretta apply retroactively to literally thousands of cases is simply not what has occurred. Rather, a few isolated situations have arisen where defendants have successfully petitioned for habeas corpus on the grounds that their constitutional right of self-representation was violated prior to Faretta. In light of these facts, allowing Faretta to be retroactive would not seriously disrupt the administration of the criminal laws.

CONCLUSION

Based upon the foregoing, the Respondent urges the Court to deny the petition for writ of certiorari.

Respectfully submitted.

JOSEPH SHEMARIA
Attorney for Respondent
ANTHONY PAUL MAXWELL

PROOF OF SERVICE BY MAIL

I affirm that I am a United States citizen, over 18 years of age, and not a party to the within action. I am employed in Los Angeles County, California, at the Law Offices of Joseph Shemaria, 8484 Wilshire Boulevard, Suite 650, Beverly Hills, California 90211, by Joseph Shemaria, a member of the Bar of this Court, at whose direction the service of mail described herein was made.

On September 9, 1982 I served the within BRIEF OF RESPONDENT IN OPPOSITION on the Attorneys for Petitioner in said action by depositing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States, at Beverly Hills, California, addressed as follows:

ATTORNEY GENERAL
State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of September, 1982, at Beverly Hills, California.

Nancy Johnson
Nancy Johnson

SEP 27 PAGE 19

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249

MOTION TO PROCEED IN FORMA PAUPERIS

AND FOR APPOINTMENT OF COUNSEL;

DECLARATION OF JOSEPH SHEMARIA

JOSEPH SHEMARIA
Attorney at Law
8484 Wilshire Boulevard
Suite 650
Beverly Hills, California 90211
(213) 658-7066

Attorney for Respondent
ANTHONY PAUL MAXWELL

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH SHEMARIA
Attorney at Law
8484 Wilshire Boulevard, Suite 650
Beverly Hills, California 90211
(213) 658-7066

Attorney for Respondent
ANTHONY PAUL MAXWELL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249 MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL; DECLARATION OF JOSEPH SHEMARIA

Respondent ANTHONY PAUL MAXWELL asks leave to file an opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner further requests that Joseph Shemaria, Attorney at Law, be appointed as counsel for Petitioner in this Court. An affidavit in support of this motion is attached hereto.

DATED: September 2, 1982

JOSEPH SHEMARIA
Attorney for Respondent
ANTHONY PAUL MAXWELL

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DECLARATION OF JOSEPH SHEMARIA

I, JOSEPH SHEMARIA, declare the following to be true and correct under penalty of perjury:

1. That I am an attorney licensed to practice in the State of California and admitted to the Bar of the United States Supreme Court;

2. That I was appointed to represent Respondent, Anthony Paul Maxwell, by both the United States District Court (Central District of California) and the United States Court of Appeals for the Ninth Circuit;

3. The Respondent, Anthony Paul Maxwell, because of his poverty, is unable to pay the costs or attorney fees for representation before this Court and is unable to give security for the same;

4. That I have represented Respondent all the way through his proceedings in District Court, on appeal from the first judgment granting the writ of habeas corpus (in the U.S. Court of Appeal for the Ninth Circuit); after reversal by the Ninth Circuit, I continued representing him in further proceedings in District Court culminating in a second judgment granting a (conditional) writ of habeas corpus and was appointed by the Ninth Circuit to represent him on the second appeal by the State of California;

5. That I am intimately familiar with the factual, legal and procedural history of this case and Respondent has indicated to me his strong desire that I represent him before this Honorable Court if certiorari is granted;

6. If the State of California's Petition for Writ of Certiorari is granted, it is respectfully requested that the Court appoint Joseph Shemaria, Attorney at Law, 8484 Wilshire

//

Boulevard, Suite 650, Beverly Hills, California 90211, (213) 658-7066, to represent the Respondent.

Executed this 2d day of September, 1982, at Beverly Hills, California.

Joseph Shemaria

JOSEPH SHEMARIA

PROOF OF SERVICE BY MAIL

I affirm that I am a United States citizen, over 18 years of age, and not a party to the within action. I am employed in Los Angeles County, California, at the Law Offices of Joseph Shemaria, 8484 Wilshire Boulevard, Suite 650, Beverly Hills, California 90211, by Joseph Shemaria, a member of the Bar of this Court, at whose direction the service of mail described herein was made.

On September 9, 1982 I served the within MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT COUNSEL; DECLARATION OF JOSEPH SHEMARIA on the Attorneys for Petitioner in said action by depositing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States, at Beverly Hills, California, addressed as follows:

ATTORNEY GENERAL
State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of September, 1982, at Beverly Hills, California.

Nancy Johnson
Nancy Johnson